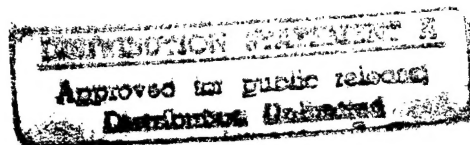




PROTECTING INSTREAM FLOWS IN IDAHO: AN ADMINISTRATIVE CASE STUDY



COOPERATIVE
INSTREAM FLOW
SERVICE GROUP

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The Biological Services Program was established within the U.S. Fish and Wildlife Service to supply scientific information and methodologies on key environmental issues that impact fish and wildlife resources and their supporting ecosystems. The mission of the program is as follows:

- To strengthen the Fish and Wildlife Service in its role as a primary source of information on national fish and wildlife resources, particularly in respect to environmental impact assessment.
- To gather, analyze, and present information that will aid decisionmakers in the identification and resolution of problems associated with major changes in land and water use.
- To provide better ecological information and evaluation for Department of the Interior development programs, such as those relating to energy development.

Information developed by the Biological Services Program is intended for use in the planning and decisionmaking process to prevent or minimize the impact of development on fish and wildlife. Research activities and technical assistance services are based on an analysis of the issues, a determination of the decisionmakers involved and their information needs, and an evaluation of the state of the art to identify information gaps and to determine priorities. This is a strategy that will ensure that the products produced and disseminated are timely and useful.

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The Biological Services Program consists of the Office of Biological Services in Washington, D.C., which is responsible for overall planning and management; National Teams, which provide the Program's central scientific and technical expertise and arrange for contracting biological services studies with states, universities, consulting firms, and others; Regional Staffs, who provide a link to problems at the operating level; and staffs at certain Fish and Wildlife Service research facilities, who conduct in-house research studies.

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PROTECTING INSTREAM FLOWS IN IDAHO:
AN ADMINISTRATIVE CASE STUDY
Instream Flow Information Paper 15

by

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PREFACE

This paper is the third in a series depicting how particular States have protected instream uses of water. The purpose of the series is to detail, historically, the four routes through which States have established instream flow protection systems. The four routes taken by the States are: the reservation of water for instream flows; the incorporation of instream flow standards into regional water quality plans; the appropriation of water for instream flows; and the administrative protection of instream flows through the exercise of State government authority in issuing, refusing, and conditioning water use permits. The first paper details how Montana established and implemented a system reserving unappropriated water for fish, wildlife, and public health purposes (Sweetman 1980). The second paper discusses California's attempts to administratively protect instream uses of water through regional water quality plans (Olive 1981). This paper discusses Idaho's system, which protects instream uses of water by appropriating flows for certain segments of rivers and streams. The fourth paper will discuss Iowa's exercise of State government administrative authority to protect instream flows through the granting, refusing, and conditioning of water use permits. The intended audience for these papers includes individuals concerned with State water plans and State water administration, government agency personnel, and the general public. These papers provide a basic look at the institutional processes in the management of instream uses of water.

This paper discusses the basic water law system in Idaho, which is important because any attempt to establish a system of instream flow protection must work within the framework of the law. This paper also provides an analysis of Idaho's governmental decisions about water allocation.

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INTRODUCTION

In Idaho, natural streams in developed areas have been altered since the gold rush and the beginning of irrigation by settlers, both in the 1860's. Large irrigation projects have been developed throughout the Snake River valley in the southern half of Idaho. The natural flow regimes of the Snake River and many of its tributaries have been altered by the development of their water resources. In some cases, flow regimes have been reduced significantly during the summer months; for example, the Snake River at Milner, Idaho is often dry. In other cases, such as the Boise River, the high winter and spring flows have been reduced by the storage of water in impoundments with the natural summer low flows being augmented by releases from the impoundments. Additional dams have been built to provide cheap renewable hydroelectric power. Initial concerns about instream uses of water were first voiced in the early water planning efforts.

Because Government bureaucratic decisions have far reaching impacts on the allocation of stream resources, one should recognize that the decision-making process is a reflection of the political and administrative climate in a State. The evolution of this process is based on a mixture of policy options formulated by small groups and policy acceptance by a pluralistic society. Idaho's society can be likened to the political scientists' description of the pluralist-elitist concept, which combines the idea of a small elite group directing society with the pluralist notion of many competing groups in society. The key to this concept is the notion that the elite is not unified; instead, the various elites compete to get their ideas enacted into governmental policy.

Different people may belong to different groups. This pluralism is (Morrow 1975:50):

...the existence of a mutual balance of power among religious, ethnic, economic, and geographical groups, with overlapping membership, all of which participate in policy-making through mutual adjustment of conflicting goals within political arenas. Every group is restrained from excess by the adjustments it must make with competitive groups.

The pluralist nature of Idaho's society led to the creation of different government agencies, each of which was designed to meet the needs of one of the many competing groups. Each agency pursues its mission, or charge, in such a way as to ensure that its constituency's goals are met. This fractionalization forces agencies to reach compromise decisions which emerge as government policy. Coordination is achieved as agencies make adjustments in their positions to ensure that their decisions are accepted by the other competing agencies. It is this process, of agencies resolving the question of how to protect instream flows in Idaho, which is the focus of this paper.

IDAHO WATER DEVELOPMENT AND WATER LAW

Idaho is a State that is marked by physical diversity. Although the State can be divided into six specific geographical areas, there are three general areas that significantly differ from one another in geography and culture. These areas are the north (or Panhandle), southwest, and southeast (Beal and Wells 1959a). The water resources of the State follow the geographical diversity and significantly influence the development of the State.

The Snake River system dominates both the southeastern and southwestern portions of the State, with its waters diverted for irrigation, municipal, and industrial uses. Water in the Snake River system is also used to develop hydroelectric power. The Snake River basin is accentuated by high mountains in the east, broad flat plains in the center of the State, and deep canyons on the western boundary. The majority of the State's people and agriculture are within the Snake River plain.

The panhandle of the State is generally mountainous and has more precipitation than does the semiarid southeast and southwest. The southern panhandle is drained by the Salmon and Clearwater Rivers. Both of these drainages are mostly mountainous and have little arable land. Only minor diversions are made from these rivers. The northern section of the panhandle receives a great deal of moisture and is the home of three large rivers -- the Clark Fork, Pend Oreille, and Kootenai. The annual flow from these three rivers is approximately 27 million acre feet (Beal and Wells 1959a). Because of substantial precipitation in this area, there is little need for diversions.

WATER LAW

Two separate events initially influenced the development of Idaho's water law. The first was the diversion of Pattee Creek by Mormon missionaries in 1855 for the purpose of irrigation. The second event was the discovery of gold in 1860 on the Clearwater River. The fact that Mormons pioneered irrigation in Idaho is significant, in that the Mormons in Utah had decided from experience that the "riparian doctrine" of water rights was not applicable to the arid climate in their area and had begun to "appropriate" water. The riparian doctrine holds that the owner of land abutting, or riparian, to a river or stream is entitled to the reasonable use of the water. The doctrine holds that those landowners that are not riparian to a river or stream are not entitled to the use of the river or stream's waters. The riparian doctrine also includes the rule that water from one watershed cannot be diverted into another watershed. Because this diversion would substantially alter the stream from which the water was transferred, it would be considered an unreasonable use.

The appropriation water right meant that an individual could divert and use water on lands that were not riparian to the river or stream if no harm was done to prior appropriations. This early form of the appropriation doctrine was pioneered in Utah, and the amount and priority date of the appropriations made in Idaho were recognized in Idaho courts (Beal and Wells 1959b).

The discovery of gold in Idaho also impacted the development of Idaho water law. Early gold seekers came from Oregon, California, the Washington territory, and British Columbia, giving Idaho the distinction of being one of the few western States settled by an eastward gold rush (Beal and Wells 1959a). The importance of this eastward rush was that many of the miners had experience in California gold fields, where a form of prior appropriation had evolved. In California, miners had appropriated water to separate gold from gravel. The appropriator had to divert water from the river or stream in a timely manner and apply the water to a beneficial use for an appropriation of water to be valid. Failure to apply the water to a beneficial use in a reasonable amount of time meant forfeiture of the water (Archibald 1977).

The most important principle in both the Mormon version of appropriation and the California miners' version is the concept of "first-in-time-is-first-in-right." Thus, the first person to divert water and apply it to a beneficial use had the best right. The second user to apply water from the same stream had the second right in priority and so forth down to the later, or more junior, users. When a shortage of water occurred, the person with the most senior right would receive full water right, and remaining users would take full water rights in priority until there was no water remaining. Thus, those with later water rights might not receive any water. The Mormon version and the miners' version of the appropriation doctrine were combined by an Idaho law, passed in 1881, which regulated the appropriation of water by requiring that an individual must post notice on a stream at the point of an intended diversion and that the individual must record the claim to water as the miners had done (Beal and Wells 1959a).

Irrigation efforts began in the Snake and Bear River Valleys of southeastern Idaho in the 1860's. These developments were small, privately dug canals and ditches with shares being granted on the basis of cash payments or through work performed during construction. The project would appropriate water from the stream to meet the needs of its share holders and receive a priority date based on the date the diversion notice was posted and recorded. The irrigation efforts in southeastern Idaho were heavily influenced by farmers from Utah drawn north by the promise of free land to homestead and the abundance of water from the Snake River (Beal and Wells 1959b).

In southwestern Idaho, water development was initiated by gold miners. In 1862, gold was discovered, which prompted a rush from the northern Idaho mining towns to the Boise Basin, where full scale placer mining began (Beal and Wells 1959a). The doctrine of appropriation was initiated for mining purposes and, subsequently, in 1863, for irrigating land to provide foodstuffs for the miners. The mining boom in the Boise Basin provided a stable base for agriculture in the area, due to the presence of lode gold ore which provided jobs for miners for a number of years.

Water development in northern Idaho followed a different course than either southeastern or southwestern Idaho. Rainfall was plentiful, so the diversion of water for irrigation purposes was generally not necessary. Instead, the water resources were used primarily for mining purposes and to transport timber products.

The appropriation doctrine was enacted prior to the Idaho Constitutional Convention convened in Boise in 1889 (Bakken 1970). The real question debated

at the Convention was not the utility of the appropriation doctrine but rather whether the miners or the farmers would have first priority to the water. Subsequently, the State was divided into economic zones, with the farmers and the miners given priority in their respective districts. This is reflected in Article 15, Section 3 of the Idaho Constitution:

9.3 Water of natural stream - Right to appropriate - State's regulatory power - Priorities. - The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied, except that the state may regulate and limit the use thereof for power purposes. Priority of appropriations shall give the better right as between those using the water; but when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall (subject to such limitations as may be prescribed by law) have the preference over those claiming for any other purpose; and those using the water for agricultural purposes shall have preference over those using the same for manufacturing purposes. And in any organized mining district those using the water for mining purposes or milling purposes connected with mining, shall have preference over those using the same for manufacturing or agricultural purposes. But the usage by such subsequent appropriators shall be subject to such provisions of law regulating the taking of private property for public and private use, as referred to in section 14 of article I of this Constitution.

With the passage of Idaho's Constitution, the appropriation doctrine became the controlling mechanism regarding water resource development in Idaho. The appropriation doctrine's basic concepts include:

- 1) First-in-time-is-first-in-right;
- 2) Water must be applied to a beneficial use;
- 3) The appropriator must move diligently in applying the water to a beneficial use; and,
- 4) Water must not be wasted.

Article 15, Section 1 of the Constitution states that all waters are declared to be public and, as such, are subject to the regulation and control of the State in the manner prescribed by law. The legislature created an agency responsible for controlling the State's waters. The legislature also provided that any individual wishing to make an appropriation must file, with the Director of the Department of Water Resources, an application for a permit (Idaho Code Section 42-202:1903). Receipt of a permit does not give the applicant a water right. Instead, the permit grants the applicant the authority to pursue the work necessary to place water to a beneficial use. Once the work is completed and water has been applied to a beneficial use, the Department issues the applicant a license, which constitutes a water right

(Idaho Code Section 42-217:1903). The applicant has a 5 year time limit to place water to a beneficial use (Idaho Code Section 42-204:1903).

The statutes include a list of conditions that must occur before the Director of the Department of Water Resources can deny a permit application. These items are (Idaho code section 42-203:1903):

- 1) That the application will reduce the quantity of water under existing water rights;
- 2) That the water supply itself is insufficient for the purpose for which it is sought to be appropriated;
- 3) That such an application is not made in good faith; e.g., for delay or speculative purposes;
- 4) That the applicant has insufficient financial resources with which to complete the work involved therein; or,
- 5) That the action will conflict with the local public interest, where the local public interest is defined as the affairs of the people in the area directly affected by the proposed use.

Under Idaho law, individuals, associations, and corporations qualify as appropriators, provided that they intend to place the water to a beneficial use. The limitation to this rule is that only residents, or entities qualified to do business in the State, are able to appropriate water for power purposes (Pierce et al. 1980). There are also limits under Idaho law that relate to diversions of water for purposes outside the boundaries of Idaho. Idaho statutes limit, unless otherwise justified, the amount of water that may be diverted for irrigation purposes to 1 cubic foot per second (cfs) for every 50 acres to be irrigated.

In times of shortage, water is allocated by order of priority date. Thus, those with early, or senior, priority dates will receive their water first and then the user with the next priority date, until there is no more water available. State watermasters oversee this process during shortage periods. Senior users are prohibited from expanding water use under the original priority date. The senior user must apply for a new permit for expansion of use, and this permit will have a later priority date subject to all users senior to the new date.

The holder of a water right is entitled to change the point of diversion, place of use, nature of use, or period of use, provided the change has been reviewed and approved by the Department of Water Resources, and that injury to the rights of others does not occur. Water rights may also be sold or transferred apart from the land, provided that the sale or transfer does not injure other rights holders, and that the sale or transfer is in the public interest.

Water rights can be lost through prescription, forfeiture, estoppel, or abandonment. A user may lose a water right through prescription when another user adversely uses the water for 5 years, provided that the use is "open, hostile, exclusive, continuous, and under claim of right" (Pierce et al. 1980:21). To fill the requirement of adverse use, the use must deprive the

original rights holder of water when it is actually needed. This loss of right through prescription does not apply to areas where watermasters regulate water within a district. The loss of a right through forfeiture requires that the right holder has not applied water to a beneficial use for a 5 year period, regardless of intent. There is a provision in the statutes that allows the Director of the Department of Water Resources to grant a 5 year extension to a right holder, provided that there is no injury to other right holders by the extension (Idaho Code Section 42-222:1903). The abandonment of a water right is guided by the intent of the right holder to abandon right. It must be proved by the party claiming abandonment that the right holder made decisive actions to abandon the right. To lose their right through estoppel, the rights holder must knowingly acquiesce that another is using and enjoying the right (Pierce et al. 1980).

Any entity or individual who has a perfected water right can seek an adjudication of that right. Several adjudication procedures are available, one of which is the statutory adjudication process. Once a statutory adjudication has taken place, a decree is issued which identifies (Pierce et al. 1980):

- 1) The amount of water to be used;
- 2) The priority date;
- 3) The season of use, purpose of use, place of use, and point of diversion;
- 4) The tract of land to which the right is appurtenant; and,
- 5) Other facts necessary to define the right.

WATER DEVELOPMENT

In southeastern Idaho, the primary focus of water development has been for irrigation through farmers' cooperatives. The farmers pool their time and money to construct canals and ditches to deliver water from the Snake River and its tributaries to irrigable lands. The farmers generally first develop the low lands and later construct larger canals to bring water to the benchland plains extending away from the rivers. The major exception to the small, privately owned irrigation systems is the Fort Hall Irrigation Project developed by the U.S. Bureau of Reclamation between 1906 and 1912 (Beal and Wells 1959b). The Fort Hall project was designed for the irrigation of Indian lands.

Water development in the central portion of the Snake River Valley has been different because the development for irrigation was done by large private concerns and government agencies. The Carey Act of 1894 stipulated that, in States where irrigation was possible, the States could receive Federal lands with the understanding that the land was to be irrigated (Beal and Wells 1959b). The availability of large tracts of cheap land near the Snake River convinced developers that water projects could be built to divert water onto the benchlands for irrigation. The first major development on Carey Act lands led to the damming of the Snake River and the founding of the Twin Falls South

Side Canal. This project brought water to 202,000 acres of land and was responsible for the establishment of the town of Twin Falls. A larger counterpart irrigation development was planned for north of the Snake River in the Twin Falls region, but financial problems and other setbacks made this project fall short of expectations.

Other Carey Act projects were begun with great optimism and promise; however, many did not reach projected goals. For example, the Twin Falls-Oakley project was proposed to irrigate some 35,000 acres of land in the Goose Creek drainage basin. The supply of water was overestimated and 10,000 acres of land were eventually dropped from the project (Lovin 1978).

In 1902, the U.S. Congress passed the Reclamation Act which established the U.S. Reclamation Service (USRS). This agency was to assist the western States in irrigating arid lands. The USRS provided expertise and construction on a scale that neither the farmers nor the States could afford. The Reclamation Act requires that the beneficiaries reimburse the government for the cost of the project in annual payments. The USRS, whose name was later changed to the U.S. Bureau of Reclamation (USBR), has developed many projects under this Act over the years.

The water development of the Lower Snake River was similar to that of the Upper Snake Valley. The early farmers built small, privately owned canals and ditches in a cooperative manner (Beal and Wells 1959b). After the crop yields proved promising, and the mining communities provided a ready market, irrigation companies were formed to irrigate the benchlands. These companies were successful in irrigating 96,652 acres by 1900, but many ventures did not enjoy the success of the Twin Falls South Side Project. One example was the ill-fated New York Canal, originally proposed to irrigate 500,000 acres (Caldwell and Wells 1974). The canal company went through several different owners before the USBR incorporated portions of the canal's original lands into its Boise Project. Prior to this, the "Big Water Suit" occurred in the Boise Basin, wherein District Judge George H. Stewart decreed the priority of water rights in the Basin from 1864 to 1904. The Judge further established irrigation practices, which included a sliding scale of cuts in water use during times of shortage. Water users, according to the Judge's system, would first reduce water use from 100% to 75%, and then to 60%, before the shutting off of water according to priority commenced (Beal and Wells 1959b). This illustrated, to the Boise Basin residents, the need for further water development, particularly storage capacity, and pressure was applied to the USBR to build the Boise Project. In 1906, the USBR commenced construction of canals, ditches, and reservoirs. Construction and improvement of the Boise Project has continued since 1906, with a corresponding increase in irrigated lands.

There is an abundance of water in the Lower Snake River, but to date the geography of the area has prevented more extensive development. Unlike the Upper and Central sections, the Lower Snake lies in deep gorges measuring from a hundred to several thousand feet below any farmable land. Thus, the majority of water development for irrigation has been on tributaries such as the Boise River. The waters of the main stem Snake have primarily been used for hydro-power generation.

Water development elsewhere in Idaho consisted mainly of small scale irrigation projects. For example, the Lemhi Valley, where irrigation began in Idaho on Pattee Creek, has small-scale irrigation projects, as do other areas of the Salmon River Basin. The Clearwater River Basin has a major dam and reservoir on its North Branch, developed primarily for flood control and hydropower. There are minor diversion projects in the Lewiston and Coeur d'Alene areas.

In 1925, the State legislature passed a bill appropriating all unappropriated water of Big Payette Lake, which recognized the recreational and aesthetic use of water that was in place. The Act states:

67-4301. Big Payette Lake - Appropriation of waters in trust for people. - The governor is hereby authorized and directed to appropriate in trust for the people of the state of Idaho all the unappropriated water of Big Payette Lake, or so much thereof as may be necessary to preserve said lake in its present condition. The preservation of said water in said lake for scenic beauty, health and recreation purposes necessary and desirable for all the inhabitants of the state is hereby declared to be a beneficial use of such water.

No fee shall be required in connection with said appropriation by the governor or the permit issued in connection therewith, and no proof of completion of any works of diversion shall be required, but license shall issue at any time upon proof of beneficial use to which said waters are now devoted.

Each succeeding governor in office shall be deemed to be a holder of such permit, in trust for the people of the state. [1925, ch. 83, 1, p. 117; I.C.A., 65-4001.]

67-4302. Big Payette Lake - Lands devoted to health and recreational uses. - The lands belonging to the state of Idaho between high and low water mark at said Big Payette Lake, as well as all other lands of the state adjacent to said lake, until the same are disposed of by the state board of land commissioners, are hereby declared to be devoted to a public use in connection with the preservation of said lake in its present condition as a health resort and recreation place for the inhabitants of the state and said public use is hereby declared to be a more necessary use than the use of said lands as a storage reservoir for irrigation or power purposes. [1925, ch. 83, 2, p. 117; I.C.A., 65-4002].

67-4003. Big Payette Lake - Separability of act. - If any part of this act shall be adjudged to be invalid, such judgment shall not affect, impair or invalidate any part of the remainder. [1925, ch. 83, 3, p. 117; I.C.A., 65-4003].

This Act was followed by another Act in 1927, which directed the governor to appropriate all unappropriated water of Priest, Pend d'Oreille, and Coeur d'Alene lakes in trust for the people. These acts are significant in that they set the precedent of appropriating water for scenic beauty, health, and recreation purposes, along with declaring these to be beneficial uses.

Water development continued for municipal, irrigation, power, and industrial uses after the acts appropriating the waters of the lakes had been passed. By the early 1960's, the State of California was considering an announced plan which would have diverted the Snake River to Lake Mead, which is on the Colorado River. Opposition to the diversion of the Snake River by California led to a constitutional amendment in 1964. The amendment reads (Idaho Constitution Act 14 Section 7):

7. State water resource agency. - There shall be constituted a Water Resource Agency, composed as the Legislature may now or hereafter prescribe, which shall have power to formulate and implement a state water plan for optimum development of water resources in the public interest; to construct and operate water projects; to issue bonds, without state obligation, to be repaid from revenues of projects; to generate and wholesale hydro-electric power at the site of production; to appropriate public waters as trustee for Agency projects; to acquire, transfer and encumber title to real property for water projects and to have control and administrative authority over state lands required for water projects; all under such laws as may be prescribed by the Legislature.

The question of whether or not a water right could be established without a physical diversion led to the legislature passing a series of laws, in 1971, allowing the Idaho Parks Board to file on the unappropriated waters of five springs or segments of streams (Idaho Code Section 67-4307-4311:1971). The proposers of the legislation, and the Director of the Department of Water Administration, viewed the action as a stage setting procedure for a court test on the constitutionality of water rights without physical diversions. The waters concerned are in the following areas:

- 1) Malad Canyon;
- 2) Niagra Springs;
- 3) Big Springs;
- 4) Box Canyon; and,
- 5) Thousand Springs.

The question of the physical diversion requirement, along with the passage of several Acts in 1925 and 1927 protecting the four lakes and the constitutional amendment in 1964 requiring development of the State Water Plan, has caused considerable debate over instream flow protection in Idaho.

INSTREAM FLOW QUESTION

Because of the numerous and sizeable water developments in Idaho, conflict among the water users and between water users and instream flow advocates was inevitable. Since 1900, the Snake River, one of the largest rivers in the Pacific Northwest, has been reduced to 0 flow during the months of July and August in central Idaho near Milner (Grant, pers. comm.). The question of whether the lower Snake River should be depleted for irrigation or whether water should remain in the river for hydropower generation is still a major issue. Another major concern is that the State's fish and wildlife resources' habitat has declined and that the remaining habitat should be protected. Early attempts to settle the issue followed the adoption of the minimum lake levels by the legislature. This action by the legislature set a precedent of appropriating water for uses other than the traditional ones. A bill, introduced in 1956 to establish minimum stream flows, did not pass (Reed, pers. comm.). The development of a State water plan opened the question of whether instream flows should be included.

The Water Resources Board awarded a contract to the Idaho Department of Fish and Game, in 1969, to gather data on instream flow needs for the Board's planning efforts connected with the water plan and to build expertise in the Department of Fish and Game for future work that the Board believed needed to be performed. A second contract was let in 1974, for the same purpose, by the Water Resources Board to the Department of Fish and Game and the University of Idaho's Cooperative Fisheries Research Unit. In the interim, the Idaho Department of Fish and Game provided the Board with information on instream flow needs based on the professional opinions of its staff biologists (Allred, pers. comm.). The Idaho Department of Fish and Game later reported instream flow needs generally lower than its original figures, using a new methodology jointly formulated by the Idaho Department of Fish and Game and the Idaho Cooperative Fisheries Research Unit.

As work was being conducted on the draft State water plan, the legislature passed the Acts allowing the Idaho Department of Parks to appropriate water on the five sites mentioned in the second Chapter to provoke a court resolution of the physical diversion requirement question. The legislature, in the Acts, stated that instream uses of water in these cases were beneficial uses of water. The proponents of the test court case wanted a determination on many of the questions concerning the legitimacy of instream uses other than hydropower production. These questions were (State of Idaho Dept. of Parks v. Idaho Department of Water Administration 1974):

- 1) May an agency of the State of Idaho, without express constitutional authority, appropriate waters and obtain a priority water right?
- 2) Does the appropriation of water for the purposes of recreation and the preservation of scenic views constitute a "beneficial use"?
- 3) May a valid appropriative water right be created in the absence of an actual physical diversion of the water from its natural flows or condition?

The State Director of the Department of Water Administration, R. Keith Higginson, expressed concern about the need for future protection of really valuable instream resources in the State and to recognize the legal rights of the current water users (Higginson, pers. comm.). Pursuing the opportunity to induce a court determination on the questions listed above, Director Higginson denied the Idaho Department of Parks' application for a water rights permit for the Malad Canyon site on the grounds that the water would not be diverted from its natural channel. The Department of Parks responded by suing the Department of Water Administration. The case, State of Idaho, Department of Parks v. Idaho Department of Water Administration, was decided by the Idaho Supreme Court in 1974 in favor of the Department of Parks. Further, the court ruled that the Constitution of Idaho does not limit the right of appropriation to private parties; thus, government agencies can hold water rights. The court ruled that the beneficial uses of water were not limited to those uses directly spelled out in the Constitution. The court stated that using water for recreation and aesthetic pleasure purposes was recognized in Idaho and other States, and the declaration by the legislature of beneficial use was proper. The Court removed the final issue regarding diversion requirements by stating that the legislature had intended to dispense with any physical diversion requirements for Malad Canyon.

With the legal questions surrounding instream uses primarily answered, Director Higginson drafted legislation to provide for future protection of valuable instream uses while recognizing the rights of water users to their existing water rights. The bill was introduced by State Senator Art Manley and it passed the Senate, but died in the House (Higginson, pers. comm.). Following this action, Director Higginson turned his attention to the State water plan.

The Idaho Water Resources incorporated the protection of instream uses in the draft State water plan. The Board also approved and included a definition of "public interest" in the plan. The draft water plan, containing the instream protection program, was adopted by the Board in 1976. In 1977, the legislature ruled that the Water Resources Board could not adopt a State water plan without prior legislative approval. The legislature formed an interim committee in 1977 to study the draft State water plan. Considerable opposition to the section on instream uses soon surfaced, and the interim committee recommended that the legislature reject the draft State water plan. Water users generally believed that the instream flow program would jeopardize existing water rights (Robison, pers. comm.).

Some of the individuals advocating an instream flow protection system met after the interim committee recommended rejection of the draft water plan and pursued a ballot initiative to protect instream flows. The initiative had three major objectives (The Hydropower Protection and Water Conservation Act 1977):

1. To conserve the use of flowing water for the generation of low cost hydroelectric power to provide for the energy needs of the people of Idaho;
2. To ensure Idaho's heritage of flowing surface rivers and streams for future generations; and,

3. To designate fish and wildlife habitat, aquatic life, transportation and navigation, recreation, aesthetic values, water quality, and scenic beauty as beneficial uses of water.

The initiative would have established, through appropriations, a base flow on all rivers and streams in the State that had unappropriated flows equal to the average flow for the month of August for the 5 consecutive lowest years between 1928 and 1977. The Governor was to hold these rights in trust for the people. The initiative also contained a section granting the Idaho Water Resources Board the authority to further appropriate unappropriated water for the protection of hydropower generation, fish and wildlife habitat, aquatic life, transportation and navigation, recreation, aesthetic values, water quality, scenic beauty, or any combination of these purposes (The Hydropower Protection and Water Conservation Act 1977). Such appropriations were to be subject to three conditions:

1. The application would not interfere with any vested water right, permit, or water right application with an earlier date;
2. The appropriation would be necessary to conserve a flow for the generation of hydroelectric power or for the protection of fish and wildlife habitat, aquatic life, transportation and navigation, recreation, aesthetic values, water quality, scenic beauty, or any combination of these purposes; and,
3. The water supply would be sufficient for the purpose of the appropriation.

The initiative drive began in late 1977 and, by the start of 1978, the drive had 10,000 of the necessary 26,000 signatures to put it on the ballot (Anonymous 1978). The initiative drive was one of the factors which caused the legislature to reconsider the instream use issue. The legislators, concerned that the initiative would go too far in establishing flows (Robison, pers. comm.), gave the State water plan a thorough review with the assistance of Steve Allred, the new Director of the Department of Water Resources. The State water plan, with its instream flow provisions, was supported by the Department of Fish and Game, the Idaho Conservation League, the League of Women Voters, the State Fly Fishermen of America Association, the Idaho Wildlife Federation, the Farm Bureau, the Water Users Association, and the Grange (Mullaney, pers. comm.; Rigley, pers. comm.; Allred, pers. comm.).

The opposition to the instream flow provisions was not well organized and the perceived balance between development and environmental concerns in the proposed State water plan took the "steam" out of those who were opposed (Allred, pers. comm.). Director Allred worked closely with the legislature on the State water plan and drafting a bill setting procedures for establishing minimum flows. The support of Rep. Vard Chapburn, Chairman of the House Natural Resources Committee, was essential in getting the bill and the water plan through the House (Allred, pers. comm.).

The Senate refused to pass the bill or approve of the water plan. This caused a controversy between the Senate and the House. The House began delaying the passage of Senate bills. This, combined with the threat of the

initiative, caused the Senate to agree to a special conference committee to iron out their differences with the House. The conference committee, which included the Director of the Department of Water Resources as an advisory member, resolved the issue, and the results were unanimously approved by both the Senate and the House (Allred, pers. comm.).

The instream flow legislation originally contained provisions that stated that the legislature must approve all instream flow permits, including those from the Water Resources Board. The Board and the Department of Water Resources, along with instream flow advocates and developmental interests, believed that Department of Water Resources should be able to approve applications without legislative approval, like any other application. A compromise, directed by State Senator Art Manley, was reached which allows the legislature to review and veto any instream flow appropriation, but does not require direct legislative approval (Allred, pers. comm.).

The State water plan also established minimum flows at specific sites on the Snake River for power purposes. These are:

- | | |
|------------------|-----------|
| 1) Milner | 0 cfs |
| 2) Murphy | 3,300 cfs |
| 3) Weiser | 4,750 cfs |
| 4) Johnson's Bar | 5,000 cfs |

After the legislature passed the minimum flow bill and the State water plan, the initiative advocates met and terminated the initiative (Mullaney 1981).

In late 1978, the Idaho Department of Fish and Game submitted several stream segment appropriation requests to the Water Resources Board. The Board agreed with the requests and submitted them to the Director of the Department of Water Resources for approval. The Department of Water Resources approved several of the applications and submitted the permits to the legislature in February, 1979. One of the applications was on Silver Creek, and a controversy soon arose over this application.

In addition to the Fish and Game's request for instream flows, a trout farmer proposed to divert the waters of Silver Creek to trout ponds. The House Committee which was considering the instream flow application returned the application to the Department of Water Resource requesting a review of the permit. While the Department was in the process of reconsidering the amounts of water requested in the application, public support for the original flow levels began (Reed, pers. comm.). Rep. Steve Antone introduced an amendment recommending passage of the original applications, which passed the House. The bill went before the Senate, where the trout farmer announced that he was no longer interested in his Silver Creek proposal, and the bill passed the Senate. The remaining instream applications were approved without opposition. The consensus, even by some of those who originally opposed instream flows, constitutes evidence that Idaho has achieved a balance between instream flow protection and water resource development (Chapman, pers. comm.).

The legislature's failure to veto the instream flow applications established the importance of the Water Resources Board and the Department of Water Resources in protecting instream flows. The Water Resources Board currently accepts instream flow applications for consideration only from

government agencies and other organized groups (Allred, pers. comm.). The Board requires that the proposing party notify landowners around the segment on which they intend to recommend an instream flow. The Board then holds a public hearing in the area where the application would be made. If the Board does recommend the application to the Department of Water Resources as worthwhile, the Department studies the recommendation to determine if it meets legal requirements. The Department also conducts public hearings on the application and, if all conditions are favorable, approves the permit and submits the application to the legislature for review within the first 5 days of the next legislative session (Allred, pers. comm.). There have been a number of applications filed in this manner.

A court action, which has recently been filed against Idaho Power Company for not protecting its water rights for hydropower generation on the Snake River, may have an impact on instream flows on the Snake River. The plaintiffs argue, in part, that, because the company has not protected its water rights, the building of more expensive thermal electric generating plants, which has driven the cost of electricity upward, was premature (Mullaney, pers. comm.). Of course, Idaho Power's water rights, like any other appropriation doctrine right, are based upon date of filing and application to beneficial use. The plaintiffs contend that Idaho Power should protect its conditional water rights against junior appropriators who could jeopardize the Company's ability to produce hydroelectric power. If the plaintiff's position is successful, the Idaho Supreme Court may find that the minimum flows set by the legislature on the Lower Snake River are lower than Idaho Power Company's water rights (Idaho Power Company v. State of Idaho 1980).

INSTREAM FLOW DECISIONMAKING IN IDAHO

In Idaho, along with the other States, bureaucratic decisions have far reaching impacts on the allocation of stream resources. One should recognize that the decisionmaking process that influences bureaucratic decisions is a reflection of the political and administrative climate in the State. A method of analysis, which can enable individuals to discover what that climate is in a State, starts with the concept put forth in the Introduction: pluralism.

Pluralism is the balance of power between a number of groups, with diverse goals and overlapping membership, where each group is restrained from excess by the adjustments it must make with competitive groups (Morrow 1975). Thus, there arise relatively stable interest groups which champion policy positions important to them. Once a group achieves a threshold of power, the positions advocated by the group will be seriously considered by governmental decision-makers.¹

POLICY THRUSTS

Societal forces which give interest groups their strength change over time. Caulfield (1959) has developed an explanation of the changes which have occurred in American society regarding resource policy. Caulfield divides the history of society's resource policies into four thrusts. The first is the development thrust, which is characterized by the use of resources to provide for the economic growth of the Nation. One of the achievements of this thrust was the development of water resources for irrigated agriculture in the West. Federal government policy was traditionally favorable to this thrust. Soon after, it became apparent that greater financial and technical resources would be necessary to develop the West's water for irrigation than the States and private investors had available to them. Federal governmental policies, such as the Reclamation Act of 1902, were formed to assist in this development (Caulfield 1974). A broad base of political support for the publically financed development of the West was provided by railroads, irrigators, farm suppliers, and others.

The second thrust was the "progressive" thrust based on the idea of egalitarianism, with a focus on individualism. This thrust has affected public policy regarding water. The strong backing for the family farm, by the proponents of the progressive thrust, led to the provision in the Reclamation Act of 1902 that Federally-developed water would only be delivered to family farmers who resided on their land (Caulfield 1974). This provision, commonly

¹One of the definitions of power, according to Barnhart (1963:666), is: "...one who or that which exercises authority or influence...". For the purpose of the remainder of this paper, the term power means the ability to command enough influence to force government decisionmakers to consider positions advanced by a group or individuals.

referred to as the 160 acre limitation, has been a point of controversy ever since its inception. The progressive thrust has also affected the sale of the hydroelectric power that is generated by Federally funded water projects. Several provisions have been placed in Federal laws stating that the sale of hydroelectric power should, preferentially, go to public bodies and rural cooperatives.

The "conservation" thrust is the third dynamic force; it is based on the development of resources and their wise use (e.g., multiple use and sustained yield). This thrust was developed out of a sense of concern by a scientific elite, in the later part of the nineteenth century and the early portion of the twentieth century, who believed that the "wise stewardship" of the country's resources is necessary to prevent "exploitation" and "dissipation" (Caulfield 1959). The elite, who formed the intellectual base of the thrust, believed that hydroelectric power was the only reliable, cheap, and replenishable source of energy available to the Nation. Thus, the thrust entered into the water policy arena on the side of the maximum development of hydroelectric power. This group also believed that "unjustifiable" gains would occur to private groups and individuals if they were allowed to own hydroelectric sites. Thus, the thrust pressed for public regulation, or ownership, of the hydroelectric sites. Proponents of the thrust were concerned with irrigation developments from the standpoint of soil characteristics in relation to the soil's ability to withstand droughts, prevent erosion, and maintain ground cover (Caulfield 1974).

The fourth thrust, the preservation thrust, was weak in political power until very recently. This thrust supports the values of preserving nature in a manner so that other forms of life, besides man, are undisturbed. The preservation thrust finds its roots in John Muir and the Sierra Club, which he founded in the 1890's. The first evidence of the preservation thrust entering into the western water policy arena was in 1913 when the Hetch Hetchy controversy arose. In this controversy, the preservationists argued that San Francisco should not be allowed to construct a series of reservoirs, intended for municipal water and power supplies, in Yosemite National Park. Proponents of the conservation thrust countered by arguing that the development of water for utilitarian purposes was more important than the narrow goal of preservation, and this argument held the day.

While the development thrust has been the major thrust in western water policy, the progressive and conservation thrusts have made their imprints upon that policy. Federal reclamation projects have combined elements of all of these three thrusts. For example, the Boise project in southwestern Idaho was constructed by the U.S. Bureau of Reclamation to irrigate large tracts of land in the Boise basin. The 160 acre limitation applies to the project, and there are flood control and hydropower purposes attached to the project as well (Caldwell and Wells 1974).

The preservationists then surfaced on water policy matters again in the 1950's, when it was proposed that the Echo Park Dam be constructed in Dinosaur National Monument, in an attempt to have their beliefs incorporated in Water Resources Management (Caulfield 1974). In this case, the preservationists were successful in persuading Congress to delete the proposed dam from the Colorado River Storage Project Act of 1956. The preservation thrust was gaining in political strength.

With the further development of concern for the environment, the preservation thrust, now closely identified with the environmental movement, has entered into the western water policy arena more and more often. For example, bills have been introduced in the Idaho legislature several times since 1956 that contained language establishing some form of instream flow protection. This has brought the preservation thrust in conflict with the supporters of the other three thrusts.

INTEREST GROUPS

Groups are formed in society to advance the positions held by proponents of various interests. These groups do not always encompass the whole pattern of thought behind the thrust they identify. Most groups tend to press for the adoption of policies affecting a narrower interest. Generally speaking, a group is formed when individuals with common interests band together formally or informally to press their demands upon government. Of those persons who believe that the interaction between groups is the central fact of politics, an interest group can be further defined as (Dye 1975:21):

...a shared-attitude group that makes certain claims upon other groups in society; such a group becomes political if and when it makes a claim through or upon any of the institutions of government. Individuals are important in politics only when they act as part of, or on behalf of, group interest. The group becomes the essential bridge between the individual and his government. Politics is really the struggle among groups to influence public policy.

The key to a particular group's influence is its relative power. This power is determined by a number of factors, such as economic resources, size in terms of numbers, strength of purpose, access to decisionmakers, leadership, and internal cohesion. The reaction of one interest group to another interest group's policy demands is often based on how those proposals will affect the first group's stated, or perceived, positions. If the other group's position will have little effect on the first group, response will probably be slight. However, if the second group's demands would adversely affect the first group's position, opposition is likely to be generated. The intensity of the opposition is directly proportional to the perceived effect the second group's demand would have on the first group's primary mission. For example, farmers and ranchers may be bitterly opposed to a coal slurry pipeline if they perceive that the pipeline will divert water away from traditional agricultural uses. The same farmers and ranchers may have little opposition to, or actually be supporters of, a water use proposal if they perceive that some benefits of the proposal will accrue to them.

Groups generally operate under constraints, such as constitutional constraints, legal constraints, judicial interpretations, and, to a certain extent, regulations and executive orders. Because interest groups are not government agencies, they are not capable of forming government policy. They must, therefore, attempt to convince decisionmakers of the validity of their positions in order to get these positions incorporated into public policy.

The process of convincing government decisionmakers that a particular position needs to be included in public policy can take many forms. First, interest groups can directly lobby legislators, chief executives, and government agency personnel. In Idaho, both the instream flow advocates, such as the Idaho Conservation League, and those who opposed minimum flows lobbied. The relative strength of interest groups often determines their success at obtaining the necessary access to government decisionmakers in order to make this strategy successful. If an interest group has sufficient power, it may have its position considered because of the groups ability to take political action against the decisionmakers. Interest groups which are closely aligned with particular government agencies are often successful at having their positions championed. Interest groups often influence government officials by appealing their case directly to the public. The formation of the water/power initiative to place an instream flow protection system on the ballot in Idaho is an example of this type of appeal. The intent is to convince the public to pressure government officials into incorporating the group's position into public policy.

Another tactic is to contest, in court, government policies with which the group finds fault. This tactic has been frequently utilized by those groups which have identified with portions of the preservation thrust in the last few years. However, groups which identify with the other thrusts have also gone to court recently. For example, in Mountain States Legal Foundation v. Andrus (1980), the development oriented interests sued the U.S. Department of the Interior to act on applications for oil and gas leases before the Department of Agriculture completed its evaluation of these lands for wilderness designation.

In the instream flow area, interest groups may be categorized as either guardians or advocates. The use of these categories was first developed by Wildavsky (1975) to describe the workings of groups and agencies within the Federal budgetary process. The categories were applied to decisionmaking on instream flows by Beckett and Lamb (1976) and to areawide planning for water quality by Lamb (1980). The definitions of the two categories are (Beckett and Lamb 1976):

Advocates are those groups which call for a change in the developmental approach to water allocation. They tend to rely on "crusading" and data to advance their position; and,

Guardians are those groups which attempt to protect the productivity or market utility of water. These groups are often established and influential and utilize legal-political strategies to advance their positions.

Both the advocates and the guardians attempt to influence government decisionmakers into incorporating their positions in public policy. This has definitely been the case in Idaho. The advocate groups, best represented by the Water/Power Initiative Committee, have collected data on changes in the fish and wildlife resources in the State and, based on those data, have "crusaded" to get policies adopted that would protect the remaining fish and wildlife resources. Guardian groups, such as the Idaho Water User's Association, attempted to keep government decisionmakers from altering the existing legal and institutional framework which allocates the State's waters.

The recent rise of the "preservation" thrust has altered the traditional balance of power between the advocates and the guardians. Previously, the guardians had sufficient strength to block advocate demands. However, as the environmental movement gained strength, advocates began to believe that, by combining the support for fish and wildlife uses with support for other instream uses (particularly hydropower), they could get legislation passed in their favor. An example of this type of coalition is the move in Idaho by instream flow advocates to link their position with hydropower interests through the Water/Power Initiative. This type of shift in power among interest groups is not new in American society. There are numerous examples of changes in public opinion that have altered the power of competing interest groups, such as the rise of the progressive movement in the late nineteenth century.

The progressive thrust rose when elements in society felt that large private enterprises were in collusion with each other. The progressives believed that when governmental policies were formed, individuals, instead of large enterprises, should be the beneficiary. The 160 acre limitation is a direct manifestation of the progressive's belief. Other examples are government policies that have developed since the depression of the 1930's. The primary objective of government before that time was to distribute the Nation's land and resources. The New Deal ushered in an era where government policy sought to regulate and redistribute land use.

In Idaho, the advocates' tactic at first was to influence government decisionmakers through the traditional lobbying of the legislature and government agencies (Reed, pers. comm.). After finding that their influence was not sufficient to overcome the guardians' objections, the advocates sought other means of achieving their goals. One of the new tactics was to incorporate an instream use protection system into the draft State water plan. When the legislature's interim committee recommended that the State water plan not be adopted, the advocates shifted to an initiative process, which included language on hydropower protection. As the initiative gained momentum, it demonstrated to the legislature that there was public support for the advocates' position.

Because of the success of the initiative, house members decided that the water plan was more balanced and that some instream use protection program was worthwhile. The key was the advocates' ability to blend an instream protection system with hydropower production and to have a water plan that provided for balance. This balanced approach defused most of the opposition (Allred, pers. comm.).

This illustrates how groups make adjustments in their policy positions to reflect the positions of other groups. In other words, groups often must make compromises on their desires in order to have their plans considered for incorporation into public policy. The result of the adjustment process is public policy characterized by a mixture of preferences. This result is brought about by the unequal power of various groups and individuals, so that policy is usually different from that which any one group or individual would have most desired (Allison 1971). It is important to understand that these adjustments are made on a distant and impersonal basis (Lindblom 1977). Thus, a group's policy positions are often adjusted to take into account another group's program not on a face-to-face basis, but rather after the group

reviews, from a distance, other groups' policy positions. The instream flow protection system in Idaho is a good example, because the advocates or the guardians received exactly what they preferred, both sides believe that the system which emerged was "balanced" (Allred, pers. comm.; Chapman, pers. comm.).

GOVERNMENT AGENCIES

Government agencies make decisions in a manner similar to interest groups. Pressure from various interest groups leads to the factionalization of government through the creation of agencies to represent various group interests and policy concerns. Agency responses are conditioned by different policy arenas in which instream use decisions are made. In their arenas, each agency plays a special role similar to one played by an interest group. By identifying these roles, the observer can predict agency behavior.

When a group achieves sufficient size and strength to place its policy concerns before the government, government agencies are assigned to meet these "new" policy problems. These new agencies are separate from existing agencies, but functionally interdependent with them. Also, government agencies often increase the scope of their mission to "capture" a new and/or a growing interest in society.

In Idaho, a good example is the change in the behavior of the Department of Water Resources (DWR). Prior to the rise of the preservationist thrust, and the interest groups associated with it, DWR primary focus was on granting water rights. Out-of-stream, power generation use, and managing the rivers and streams to insure the protection of vested water rights were the major objectives. This has now changed to balanced water management, including protection for fish and wildlife and other instream uses. The Department, through legislative mandates, expanded its mission to represent those who support the preservationist view, as well as the traditional water users.

Thus, there are two ways government responds to new policy questions and interest groups. These are through new agencies or by changing roles of existing agencies to encompass new concerns. Both of these responses led to the cooptation of government institutions by well organized and financed interest groups which identify their interest with the common good (Morrow 1975). It is within this fragmented, pluralist system that the decisionmakers act to make government policy.

Several schemes have been developed by political scientists to describe government decisionmaking. Lamb (1980) and Doerksen and Lamb (1979) describe the decisionmaking arena concerning the question of instream flow protection. Their combination of models can be applied to the decisionmaking arena in Idaho. These models are:

- 1) Incrementalism;
- 2) Organizational Process; and,
- 3) Mutual Adjustment.

Incrementalism can be defined as agencies taking positions on problems that are only slightly different from previous policy positions, where the new positions tend to reaffirm existing policies. Incrementalism has advantages

for the decisionmaker because it limits the risks and political costs faced by the decisionmaker. This is because decisions are being made incrementally, which rely on the substance of past policies (Sharkansky 1975). This process produces the concept of a "base" which can be a solid, unquestioned foundation for future policy actions. A major question is whether incrementally made decisions have any guiding direction behind them or if they just happen. Lindblom (1964) believes that incremental decisionmaking is rational, guided by agency missions, and that changes in the social structure can be made more rapidly through a series of directed incremental steps than through a few drastic changes.

The Department of Water Resource's decision to investigate instream flow needs for inclusion in the draft State water plan is an example of incremental change. The Department did not drastically alter its basic mission of managing Idaho's water resources; instead, it added instream flow concerns as another use for which water had to be managed.

Organizational process is the idea that agencies rely on existing organizational routines for the collection, analysis, and utilization of information relevant to a problem (Beckett and Lamb 1976; Doerksen and Lamb 1979; Lamb 1980). Allison (1971) believes that governmental behavior can be understood less as deliberate choices and more as outputs of large organizations which function according to standard operating procedures. The guide behind this scheme is that government organizations are so large that a central authority cannot make all the decisions or direct all of the important activities. This forces decisions to be made inside the agency through standard operating procedures. Another important aspect of the organizational process is that the standard operating procedures allow large numbers of individuals to handle situations, which arise daily, because of the low individual risk involved. In the cases where standard operating procedures do not apply, problems are often handled inappropriately or sluggishly. A drawback to the organizational process is that agency personnel often internalize the operating procedures and resist changes in existing procedures, thereby limiting flexibility and stifling creativity.

For example, the Idaho Department of Fish and Game's standard operating procedure is to improve its data collection methods whenever possible. The Fish and Game Department's reaction to the Department of Water Resource's contract to determine instream flow needs for the draft State water plan was to devise an improved method for data collection and analysis of those needs.

Mutual adjustment is the bargaining process agencies engage in where the outcomes will be a reflection of the agency's influence based upon the size and influence of its constituency, type of responsibility, and centrality of the issue to the mission of the agency. Lindblom has stated that the interdependence among the administration of the hundreds of governmental units in America often requires mutual adjustment. He goes further to state (Lindblom 1977:29-30) "...that this mutual adjustment carries much of the load of coordination in any government." Allison (1971) believes that mutual adjustment results in different groups fighting for their various interests, thereby producing a decision which is a mixture of conflicting preferences and the unequal power of various individuals that is different from that which any of the individuals would have wanted. Mutual adjustment reduces the risk in decisionmaking because a decision can be supported with changes in content and style (Sharkansky 1975).

All three of the schemes help explain the decisions taken on instream flow issues in Idaho. For the individual trying to predict an agency's behavior on instream uses, attention should be paid to the behavioral aspects of these three decision schemes. But there is more to predicting agency behavior than simply recognizing the presence of incrementalism, standard operating procedures, and bargaining. The first step to this expanded understanding is to explore the policy areas in which government operates. Lowi (1964) states that government policy operates in four basic areas. These areas are distributive policy, regulatory policy, constituent policy, and redistributive policy. Of these, the distributive and regulating policy arenas characterize instream flow decisionmaking in Idaho.

The distributive policy arena exists when the government operates as a broker. Distributing the public lands to private individuals is a classic example. The building of coalitions through log rolling is the key. Through this process, coalitions are built of interests having little in common, except for the support of a particular distributive action. Thus, the policies are characterized by cooptation instead of conflict and compromise (Lowi 1964). It is in this arena that interagency bargaining is emphasized.

The best example of this in Idaho was the complex mutual adjustment process that surrounded the issue of legislative review and approval of proposed instream flow appropriations. The Department of Water Resources adjusted its position to support legislative review of the proposed flows when it actually wanted the ability to handle the proposed flows through normal administrative channels. The legislature adjusted its position to the concept of review, with the option of rejecting the proposed flows, when many of its members had wanted to approve each proposed instream appropriation.

The regulatory arena is characterized by a number of groups competing to have their interests accepted as government policy. While distributive policies are formed around groups with uncommon interests, the policies in the regulatory arena are formed by groups with shared interests. Because of this, coalitions built in the regulatory arena shift at a more rapid rate when interests change or conflicts of interest arise than do those in the distributive arena.

Agencies often combine the decision schemes and policy arenas that describe the roles agencies often play in the instream flow area. There are two basic types of agency roles: allocators and activists. The allocator agencies preside over decisionmaking, while the activist agencies are involved in confrontation (Beckett and Lamb 1976; Lamb 1980). This analysis further subdivides these two types of agencies along lines of responsibility. The allocator category has two divisions, brokers and arbitrators. The activist agencies can be categorized as advocates and guardians (Beckett and Lamb 1976). Allocator roles are:

Brokers. Agencies who allocate water through their ability to physically control streams via impoundments. Brokers are in a position to support either environmental or developmental interests. They favor benefit-cost analysis, mechanisms for controlling flows, and, to some extent, political considerations. This last item is possible due to the nature of the groups either supporting or seeking favors from the Brokers. Brokers prefer strategies which play the

activist agencies against each other to attain control of the balance of power; and,

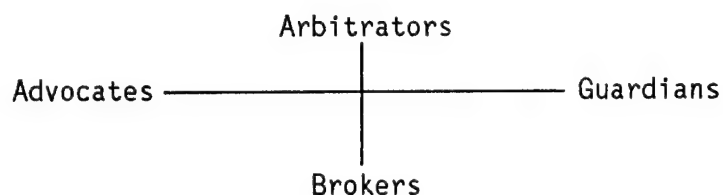
Arbitrators. Agencies which have the statutory authority to establish instream flow regimes as well as the ability to legally allocate water. These are usually policy making agencies that rely on data collected by others and make authoritative allocations after hearing evidence from all sides. Arbitrators avoid political or public participation strategies by relying mostly on legal proceedings and management strategies.

Activist agencies are:

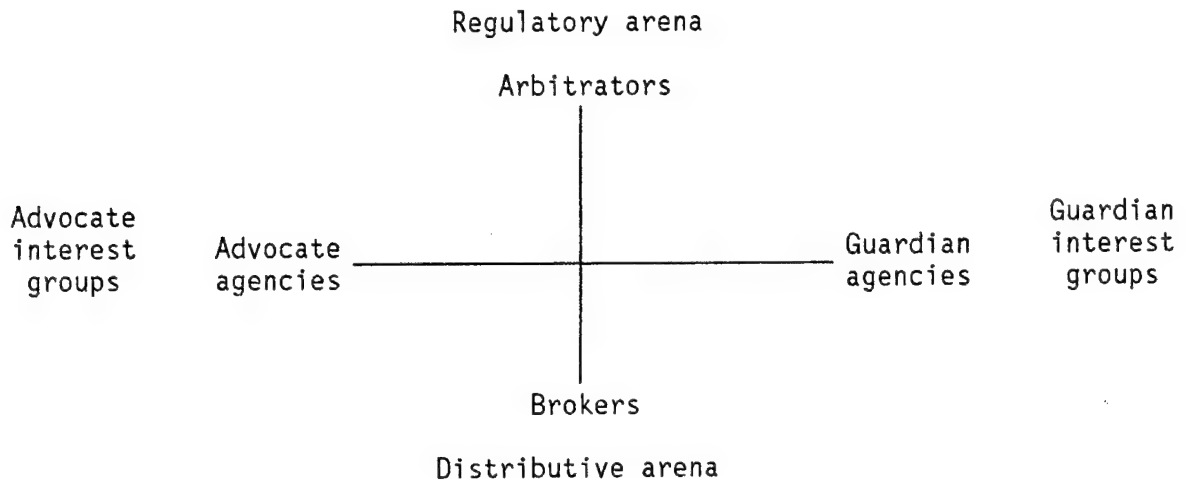
Advocate. Agencies which call for a change in the developmental approach to water allocation. These agencies are often without enabling legislation or are reactive to the initiative held by other agencies. Such agencies rely on "crusading" and data to advance their positions; and,

Guardian Agencies which attempt to protect the productivity or market utility of water. These agencies prefer legal-political strategies, such as interest group consultation and public participation because guardians are backed by established and influential support groups.

This concept can also be represented by a diagram.



The same diagram can be expanded to show how these roles are related to interest groups and policy arenas. The key to understanding instream flow decisionmaking is to determine how the decision schemes operate in each quadrant of this diagram. Thus, the roles and decision schemes can be combined to predict agency behavior in any case.



Advocate agencies and groups prefer policymaking in the regulatory arena. Here, the advocates use their data and "crusading" efforts to counter the arguments of the guardian agencies. The guardian agencies seem to prefer operating in the distributive arena where they bring their political weight to bear by forming fairly stable coalitions through log rolling.

Instream use advocates enter into negotiations in the distributive arena on a case-by-case basis, but seek to push the process toward a regulatory process. For example, the U.S. Army Corps of Engineers is a broker agency and operates in the distributive policy arena. Instream use advocates enter into the coalition building and log rolling negotiation process by stating that they would not oppose the project if a certain pattern of releases are incorporated in the project's operating manual and that those releases be protected for a certain reach of the river or stream. This position leaves an opening for bargaining, but, at the same time, the advocates try to force the decision-maker into a regulatory posture.

REVIEW OF STRATEGY SETTING

For the individual who is interested in establishing a system of instream flow protection, a review of the decisionmaking scheme is useful. The goal of the scheme is to predict interest group and governmental agency behavior and build a strategy that will be adopted into public policy.

The first step in the scheme is to survey the advocate and guardian interest groups to determine their relative strengths. Such an analysis was done by Doerksen and Lamb (1979). They have categorized agencies by their relative power and set out a method for assessing this factor. An agency's behavior will change depending on their relative power and interest groups with which they interact.

The second step is to review agency action in terms of the proposed decision schemes: incrementalism; organizational process; and mutual adjustment. This will enhance an individual's ability to predict agency behavior. The Idaho example illustrates how this works. The Agencies collected, disseminated, and evaluated information according to standard operating procedures. But, insofar as the groups and agencies did change, they did so through a long period of interagency bargaining.

The fourth, and final, step is to identify agencies and roles. This will depend on the policy context, either regulatory or distributive, and which agency is making decisions. From this identification, it is possible to determine the various agencies' and groups' perspectives regarding the establishment of a system of instream flow protection. Brokers perceive the need to maintain physical control over rivers and streams, and they will resist efforts to limit this power. Arbitrators perceive the need to maintain the ability to legally allocate water. Advocates wish to change the allocation system and form strategies to pursue this goal. Finally, guardians pursue strategies to maintain the productivity and market value of the water.

The decisionmaking scheme presented here should allow the interested individual to:

- 1) Identify the forces in society that influence the creation or cooptation of government agencies;
- 2) Understand how government agencies make decisions;
- 3) Identify the policy arenas in which the various actors are operating; and,
- 4) Determine which roles agencies and groups play.

This scheme gives the interested individual a tool to assist in predicting agency and group behavior when instream flow protection strategies are initiated.

CONCLUSION

The rivers and streams of Idaho have been dammed and diverted to provide the water necessary for the economic development of the State. Thus, the number of rivers and streams that are in a natural condition has steadily diminished over the years. The fish and wildlife resources associated with natural stream conditions also have declined. This decline was of concern to environmentally oriented individuals and groups who questioned the traditional use of Idaho's water resources. The questions of whether instream uses should be included in the legal and institutional framework of Idaho led to the initiative drive and minimum flow legislation.

Groups and individuals interested in establishing a system that protects instream flows should analyze the situation in their area before formulating plans. The first step in this analysis is to identify objectives. As simple as this may sound, this is a very important aspect of planning. Without a firm idea of goals, it is easy to drift during policy formulation.

The second step in the analysis is to reveal opportunities that allow for the achievement of objectives. A careful review of the laws containing language that labels instream uses of water as beneficial should be made. Reviews of court decisions pertaining to water rights and allocations should be made also. Administrative procedures need to be reviewed, particularly those of the broker and arbitrator agencies. Areas which should not be ignored are the opportunities for legislative action and the opportunities to gather public support.

The third step in the analysis is to identify the agencies and interest groups involved in policy formulation. It is important to identify all of the agencies and groups, friends and possible foes alike, that can be affected by an instream flow protection system. Agencies and groups which are not identified can later attempt to interject their positions into the policy formulation process and, thus, disturb the strategy which has been chosen to protect flows. Also, it is necessary to identify the relative strengths of the participating parties, so that too much time and effort is not spent trying to meet the needs of a weaker party while a stronger one's needs are ignored. Failure to do this could lead to the stronger party disrupting the process.

The fourth step is to discover the roles and needs of the various agencies and groups. This is where the decisionmaking scheme discussed earlier comes into play. Through the use of this scheme, it is possible to ascertain the perceived needs and behavior patterns of the various parties involved and the degree to which a system protecting instream flows would affect those needs. The identification of the needs of the parties is important in that failure to properly identify a party's needs can lead to that party refusing to negotiate or compromise on a crucial point in the instream advocates' strategy. This possible refusal can cripple the strategy and often extends the time necessary to establish a protection system.

The fifth and final step in the analysis is the formulation of a strategy or a set of strategies. The strategy, or strategies, should be a product of what has been learned in the previous four steps. Also, while the Idaho experience is useful in illustrating how various strategies were received in

that State, strategies in other States should reflect local conditions. It is possible that the proper strategy in other States would be to have instream uses of water become a beneficial use of water. This legal distinction is already in place in some States, in which case other strategies would be more appropriate.

Through the use of the scoping process, as well a review of the instream flow practices and strategies used in other States, groups and individuals interested in establishing a system which will protect instream flows will have a better opportunity to achieve their goals.

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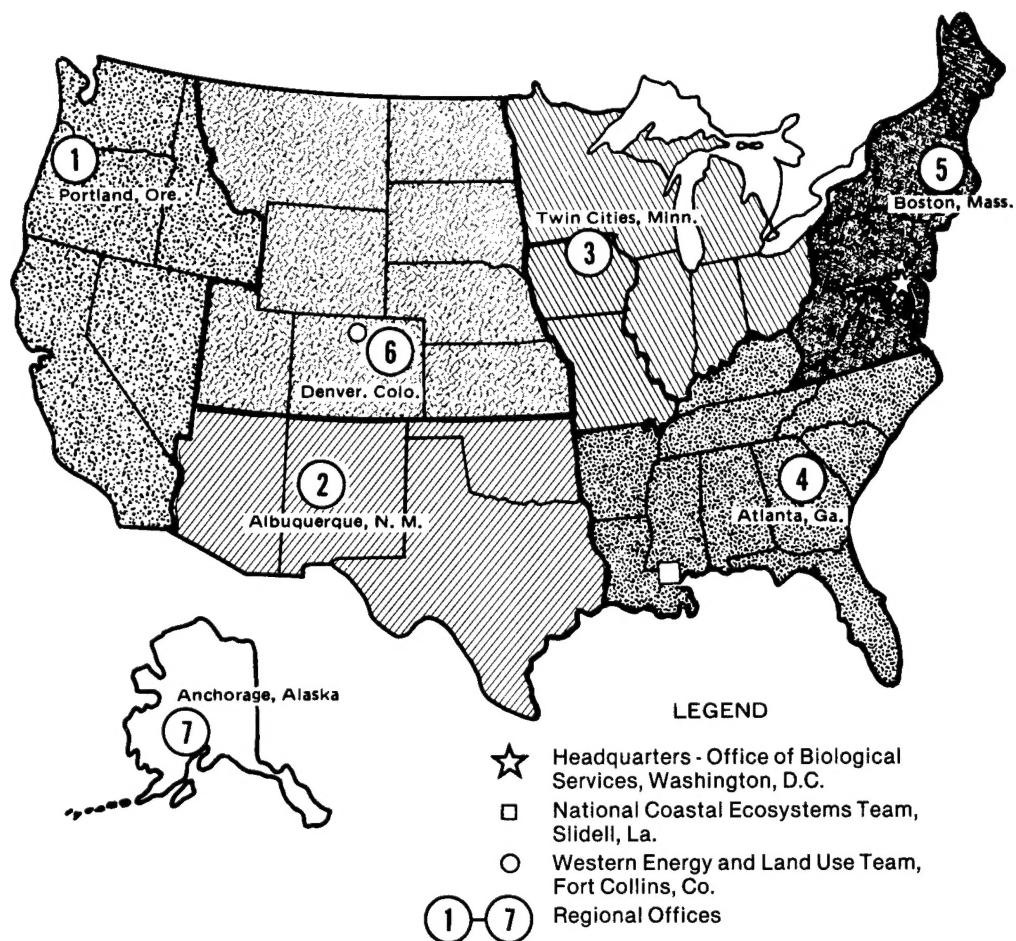
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